302

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EDWARD ANDREW KIMPEL, III,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
APPELLATE COURT OF ILLINOIS, THIRD DISTRICT

BRIEF FOR RESPONDENTS IN OPPOSITION

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INDEX

	Page
TABLE OF AUTHORITIES	ii
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED FOR REVIEW	3
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI:	
INTRODUCTION	4
I. APPELLATE ATTORNEYS OF INDIGENT DEFENDANTS SHOULD NOT BE REQUIRED TO FILE *ANDERS*-TYPE BRIEFS WHEN THEY RAISE ONLY ISSUES PERTAINING TO SENTENCING AND WHEN THEY HAVE NOT BEEN REQUESTED BY THEIR CLIENTS TO RAISE ANY ADDITIONAL ISSUES	4
II. ANY ISSUE CONCERNING THE EFFECTIVENESS OF APPELLATE COUNSEL WOULD BE UNIQUE TO THE FACTS OF THIS CAUSE AND AS SUCH WOULD LACK ANY PRECEDENTIAL SIGNIFICANCE	7
III. THE TRIAL JUDGE'S CONSIDERATION, PRIOR TO SENTENCING, OF CERTAIN EIGHTEEN TO TWENTY-ONE YEAR OLD PSYCHOLOGICAL EVALUATIONS ATTACHED TO THE PRESENTENCE REPORT WAS PROPER WHERE THE RECORD DEMONSTRATES THAT HE WAS FULLY COGNIZANT OF THE DEGREE OF RELIABILITY AND ACCURACY OF THE INFORMATION CONTAINED IN THE REPORTS, WHERE HE DID NOT REFER TO THE REPORTS WHEN HE STATED THE FACTORS ON WHICH HE BASED HIS SENTENCE, AND WHERE THE SENTENCE IMPOSED WAS AMPLY SUPPORTED BY OTHER EVIDENCE	9
CONCLUSION	13

TABLE OF AUTHORITIES

CASES:

	Page
Anders v. *California*, 386 U.S. 738 (1967)	4-7
Douglas v. *California*, 372 U.S. 353 (1963)	5
Ellis v. *United States*, 356 U.S. 674 (1958)	5
Griffin v. *Illinois*, 351 U.S. 12 (1955)	5
Market Street R. Co. v. *Railroad Commission*, 324 U.S. 548 (1975)	2
Martin v. *Brierly*, 464 F.2d 529 (3rd Cir. 1972)	6
Nickols v. *Gagnon*, 454 F.2d 467 (7th Cir. 1971)	6
People v. *Hamby*, 32 Ill.2d 291, 205 N.E.2d 456 (1965)	2
People v. *Hesler*, 60 Ill.App.3d 59, 376 N.E.2d 408 (2nd Dist. 1978)	2
People v. *Kimpel*, 78 Ill.App.3d 929, 397 N.E.2d 926 (3rd Dist. 1979)	3
People v. *Lang*, 113 Cal. Rptr. 9, 520 P.2d 393 (1974) (en banc)	6
People v. *Vance*, 76 Ill.2d 171, 390 N.E.2d 867 (1979)	2

STATUTES AND OTHER AUTHORITIES:

Ill.Rev.Stat. ch. 38, § 122-1 *et. seq.* (1979)	2
28 U.S.C. § 1257	2
28 U.S.C. § 2254	8
R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978)	2

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OPINION BELOW

The Illinois Appellate Court Opinion was correctly cited in petitioner's brief. (Petition at 2)

JURISDICTIONAL STATEMENT

Respondents take exception to any claim that this Court has jurisdiction, at this time, to resolve the first of petitioner's two questions presented for review. The jurisdictional requisites for the second question presented for review are adequate-

ly set forth in the Petition for Writ of Certiorari. (Petition at 2) However, as treated more fully in the argument portion of this Brief in Opposition, respondents do not believe that petitioner has shown any compelling reason for this Court to grant the writ of certiorari, irrespective of whether proper jurisdiction lies.

The first question presented for review by petitioner, that which concerns the conduct of his appellate counsel, fails to conform to the requirement that the judgment appealed from is "final". 28 U.S.C. § 1257 (1979). Before certiorari lies, the state court judgment must be subject to no further review or correction in any other state tribunal. *Market Street R. Co.* v. *Railroad Commission,* 324 U.S. 548, 551 (1945); R. Stern & E. Gressman, Supreme Court Practice (5th ed., 1978) at 173.

Petitioner first questioned his appellate counsel's effectiveness in an amended petition for leave to appeal in the Illinois Supreme Court. (Petition at 2, 4) The Illinois Supreme Court then denied leave to appeal. (Petition at 38a-39a) The Illinois Supreme Court's action is not a decision on the merits and has no *res judicata* effect. Analogous to this Court's denial of a writ of certiorari, the denial of leave to appeal carries no connotation of approval or disapproval of the Illinois appellate court's action. *People* v. *Vance,* 76 Ill.2d 171, 390 N.E.2d 867, 872 (1979). Nevertheless, the Illinois Supreme Court's action has not left petitioner without remedy in the Illinois courts. Issues involving the effectiveness of appellate counsel are cognizable under the Illinois Post-Conviction Act, Ill. Rev. Stat. ch. 38 § 122-1 *et. seq.* (1979). *See, e.g., People* v. *Hesler,* 60 Ill. App. 3d 59, 376 N.E.2d 408 (2d Dist. 1978). *C.f. People* v. *Hamby,* 32 Ill.2d 291, 205 N.E.2d 456 (1965).

Due to the fact that the Illinois Appellate Court judgment is still subject to collateral review in the Illinois courts and that the identical issue raised before this Court may be maintained in that collateral proceeding, it behooves this Court to refrain from exercising jurisdiction over petitioner's first claim.

QUESTIONS PRESENTED FOR REVIEW

1. Whether appointed appellate counsel is constitutionally required to file an *Anders* brief in an appeal where the brief that he submitted raised issues concerning the sentencing hearing but not issues involving the conviction itself and where counsel did not request to withdraw from the case? Whether the quality of counsel's appellate brief and his decisions to waive oral argument and not to file a reply brief constituted ineffective assistance of counsel?

2. Whether petitioner was deprived of due process at his sentencing hearing when the trial court admitted, over a claim of unreliability, certain aged psychological evaluations where the record demonstrates that the court was fully cognizant of the degree of reliability of the information contained in the reports, where the court did not refer to the reports when it stated the factors on which the sentence was based, and where the sentence imposed was amply supported by other evidence?

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner has quoted those amendments to the United States Constitution applicable to this case. (Petition at 3)

STATEMENT OF THE CASE

In addition to the argument set out in petitioner's brief (Petition at 3-5) those facts needed for this Court to decide the Petition for Writ of Certiorari can be found within the Illinois Appellate Court's opinion *People* v. *Kimpel,* 78 Ill. App.3d 929, 397 N.E.2d 926 (3rd Dist. 1979). Other facts are set out as needed in the ensuing sections of this brief.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI:

INTRODUCTION

In seeking a writ of certiorari in this cause, petitioner alleges that he was denied his sixth amendment right to effective assistance of counsel in that Theodore Gottfried, the signatory on the appellate brief, filed an "incompetently" prepared brief, filed no reply brief, and waived oral arguments. Petitioner also claims that counsel violated the dictates of *Anders* v. *California*, 386 U.S. 738 (1967), when, in his appellate brief, he did not address any issues relevant to the conviction and only issues pertaining to the sentence imposed on petitioner. In a second issue, petitioner seeks a writ of certiorari to have this court review the material relied on by the trial court at the sentencing hearing.

Respondents believe that it would not be prudent for this Court to grant certiorari because an extension of *Anders* in this case defies both the letter and spirit of that opinion and would not be in the best interest of indigent defendants; the issue of competency of counsel herein revolves around facts peculiar to the case at hand and would not involve issues germane to any future litigants; and the trial court's consideration of the questioned material at the sentencing hearing was proper or, if not, the material was not so inherently unreliable as to undermine the fairness of petitioner's sentencing hearing.

I.

APPELLATE ATTORNEYS OF INDIGENT DEFENDANTS SHOULD NOT BE REQUIRED TO FILE *ANDERS*—TYPE BRIEFS WHEN THEY RAISE ONLY ISSUES PERTAINING TO SENTENCING AND WHEN THEY HAVE NOT BEEN REQUESTED BY THEIR CLIENTS TO RAISE ANY ADDITIONAL ISSUES.

The sixth amendment guarantees a criminal defendant the right to effective assistance of counsel. This Court has con-

sistently interpreted that right to require that an indigent defendant enjoy substantially the same kind of appeal as one who can afford to retain an attorney of his choice. *See, e.g., Douglas* v. *Califo ia,* 372 U.S. 353, 355 (1963); *Griffin* v. *Illinois,* 351 U.S. 12, 19 (1955)

In *Anders* v. *California,* 386 U.S. 738 (1967), this Court held that an indigent defendant is denied his right to counsel when that counsel merely files a letter with the court in which he alleges, in conclusory terms, that the appeal has no merit and that he will file no brief. *Id.* at 744-45. The Court reasoned that counsel has not fulfilled his duty as an advocate for his client when he acts more as an *amicus curiae* than as an advocate. *Id.* at 744. *See also Ellis* v. *United States,* 356 U.S. 674, 675 (1958). The Court then outlined the procedures required of counsel in those instances when he finds his case to be wholly frivolous. In those cases, he must file a brief [hereinafter referred to as an *Anders* brief] referring to anything in the record that might arguably support the appeal. These are the requirements that petitioner contends should have been employed in the instant case.

Respondents submit that such a procedure was not required here. Mr. Gottfried filed a two-issue appellate brief in which he urged that petitioner's sentence be vacated.[1] *Anders* requires no more and petitioner's constitutional protections are no greater.

Notwithstanding petitioner's assertion to the contrary, *Anders* makes no distinction between sentencing issues and issues challenging the conviction. An *Anders* brief is required only when *no* issues are raised *and* counsel seeks to withdraw as advocate for his client. Arguably, an appointed counsel is

[1] Petitioner also asserts that the brief filed by counsel was ineptly drawn. While petitioner concedes that this fact is not critical to his *Anders* claim (Petition at 7, n.3), the competency of counsel will be addressed *infra,* in the next subsection of this brief.

bound to advance in some fashion those issues which his client insists have merit even if counsel disagrees, but that dereliction is not involved here. Because counsel was not endeavoring to withdraw from the case, because counsel did not undermine his role as an advocate, and because petitioner has never asserted that he requested that certain issues be raised that were not, Mr. Gottfried should not be required to have set out those issues that might arguably[2] have been raised but were not.[3]

An extension of *Anders* to require the inclusion of all arguable issues in cases where counsel is not seeking to withdraw as an advocate would result not only in an infusion of meritless cases into the judicial system but also in a differentiation between briefs of appointed and retained counsel that would clearly disfavor indigent defendants. Retained counsel would continue to refrain from inserting marginal issues into an appellate brief, knowing that this practice antagonizes courts and deflects attention from more meritorious contentions. Since the purpose of *Anders* is to place indigent defendants in a similar position to those defendants financially able to retain counsel of their choosing, *c.f. Nickols* v. *Gagnon,* 454 F.2d 467, 471 (7th Cir. 1971) (Stevens, J.), then this result would be adverse to this Court's intentions. Appointed counsel should

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[2] Petitioner sets out four additional arguments that might have been raised. While the merits of those issues are irrelevant to this inquiry, *Suggs* v. *United States,* 391 F.2d 971 (D.C. Cir. 1968), respondents submit that these issues are indeed frivolous and lacking in merit.

[3] Petitioner cites no case law in support of his argument. He claims that exhaustive research uncovered only one case, *People* v. *Lang,* 113 Cal. Rptr. 9, 520 P.2d 393 (1974) (en banc), that presented similar facts. (Petition at 10, fn. 8) However, petitioner overlooked *Martin* v. *Brierley,* 464 F.2d 529 (3d Cir. 1972), where, in a per curiam opinion, the court held that there was no basis in the record for petitioner's contention that counsel failed to follow the procedure prescribed by *Anders.* Counsel obviously did not consider the appeal to be frivolous, the court ruled, since he did not withdraw his appearance but rather pressed the appeal and actually secured relief for the petitioner by way of a credit on his sentence.

not be required to act in a manner inconsistent with a procedure by which retained counsel have been able to serve their clients best.

Petitioner also raises the question that counsel might consciously attempt to avoid the procedures prescribed by *Anders* by filing a brief raising only sentencing issues. Concededly this is a possibility, but so too is the chance that counsel might seek to circumvent *Anders* by raising one or two issues pertaining to the conviction. The answer is not to extend *Anders* in this case, but for courts to insure that only competent and responsible attorneys that are responsive to the needs of their clients are appointed.

Mindful that perfect equality between indigents and nonindigents is impossible to achieve, this Court should not seek, under the guise of extending constitutional rights, to require of an appointed counsel that which would be frowned upon if performed by retained counsel. The writ of certiorari should be denied.

II.

ANY ISSUE CONCERNING THE EFFECTIVENESS OF APPELLATE COUNSEL WOULD BE UNIQUE TO THE FACTS OF THIS CAUSE AND AS SUCH WOULD LACK ANY PRECEDENTIAL SIGNIFICANCE.

While claiming that counsel failed to conform to the prescriptions of *Anders,* petitioner also claims that he was denied effective assistance of counsel due to the allegedly inept quality of Mr. Gottfried's brief and his decisions not to file a reply brief and to waive oral argument.

In turn, respondents submit that counsel's decisions not to file a reply brief and to waive oral argument are customary practices in the legal profession and do not evince a deprivation of an indigent's constitutional rights. As to the quality of petitioner's appellate brief, respondents submit that this issue

merely involves the application of a set of facts to a legal standard, an issue unworthy of this Court's precious time.

Petitioner categorizes the brief filed by Mr. Gottfried as a throw-away brief that enabled counsel to dodge his responsibilities. (Petition at 7) However, in the "inept" brief, as petitioner depicts it (Petition at 7, fn. 3), twelve authorities were cited and issues were raised that even present counsel consider worthy enough to advance to this Court. It is totally inconsistent with logic for present counsel to argue, on the one hand, that Mr. Gottfried avoided his obligations to his client by filing an inept brief and, on the other hand, to seek a writ of certiorari in this Court on issues initially ferreted from the record by Mr. Gottfried and raised by him before the appellate court.

Furthermore, it should be noted that counsel's decisions to waive oral argument and not to file a reply brief are strategy decisions commonly utilized by the criminal bar. The Illinois Appellate Defender's Office, which Mr. Gottfried heads, waives oral arguments in almost half of its cases. The criteria used is whether novel issues have been raised or whether the argument might go beyond the scope of the briefs. Perhaps, a federal habeas corpus action would be a more appropriate remedy for seeking a justification or explanation of Mr. Gottfried's actions in this case.[4] A district court, if it finds any merit to petitioner's contentions, could order an evidentiary hearing and inquire into Mr. Gottfried's entire relationship with his client.

For these reasons, this Court should not grant a writ of certiorari in this cause.

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[4] Of course petitioner must first exhaust any available state court remedies before proceeding in federal court. 28 U.S.C. § 2254(b) & (a). (*See* Jurisdictional Statement, *supra* at 1.)

III.

THE TRIAL JUDGE'S CONSIDERATION, PRIOR TO SENTENCING, OF CERTAIN EIGHTEEN TO TWENTY-ONE YEAR OLD PSYCHOLOGICAL EVALUATIONS ATTACHED TO THE PRE-SENTENCE REPORT WAS PROPER WHERE THE RECORD DEMONSTRATES THAT HE WAS FULLY COGNIZANT OF THE DEGREE OF RELIABILITY AND ACCURACY OF THE INFORMATION CONTAINED IN THE REPORTS, WHERE HE DID NOT REFER TO THE REPORTS WHEN HE STATED THE FACTORS ON WHICH HE BASED HIS SENTENCE, AND WHERE THE SENTENCE IMPOSED WAS AMPLY SUPPORTED BY OTHER EVIDENCE.

Petitioner contends that the trial court erroneously based its sentencing determination on unreliable and "stale" information contained in three psychological evaluations that were appended to the presentence investigation. Respondents contend that the instant record demonstrates that the trial court was fully informed of the degree of reliability and accuracy of the information in the psychological reports when those were introduced at the sentencing hearing. Furthermore, the record does not indicate that the trial court relied on that information contained in the reports. Finally, the abundant aggravating facts of record that were relied on by the trial court support the sentence imposed.

After a jury trial, petitioner was convicted of murdering a pregnant woman. At the commencement of petitioner's sentencing hearing, petitioner's counsel moved that various portions of the presentence investigation report be stricken. The trial court granted the motion in part and denied it in part. (R. 3-4). [All transcript references are to the sentencing hearing]. As to the portion of defendant's motion asking that

the three psychological evaluations be stricken, the trial court ruled as follows:

> . . . Now whether it is true or untrue I think that is the question. Is the truth of the matter that is set forth, not whether it is stale or hearsay but whether it is true or untrue and I think that is the reason why we allow a hearing on the report. Now this report was filed May 19, 1978 in this court and that has given the defendant ample time to review and study it and as the Act says inspect it. Now if these matters are not true, there is no allegation in the motion. They are not true, however I will agree the matters brought up in '57, '59 and '60 are stale but nevertheless there is nothing in this motion saying those matters ever are not true. I will allow a hearing at this time and if defendant wishes to proceed and show to the court that these are untrue then I will entertain that at this moment. (R. 6-7)

Thereafter, petitioner took the stand and testified extensively and exhaustively concerning each allegation contained in the disputed reports, the credentials of the authors of those reports, and the amount of time that each author had spent with him. (R. 9-55)

At the close of petitioner's evidence in mitigation, his attorney moved again to strike the psychological reports from the presentencing investigation. The trial court responded:

> Alright, the ruling of the court has been already announced. I am sure the court can evaluate the reports in connection with the testimony given as to any weight that might be given to them.

(R. 95)

At the close of the sentencing hearing, the trial court specifically found that none of the statutorily enumerated factors in mitigation was present. (R. 132) In aggravation, it found the following statutory factors: that petitioner inflicted serious bodily harm; that petitioner had a history of prior delinquency and criminal activity; and that a long sentence was necessary to

deter others from committing the same crime. (R. 133) The trial court further found that an extended term would not be warranted, since it believed that petitioner's conduct in the instant case did not meet the criteria of heinous and exceptionally brutal conduct. However, since the court concluded petitioner's offense was close to the standard for an extended term, it considered the maximum term of forty years to be appropriate. (R. 134)

The evidence adduced at trial showed that petitioner murdered the victim in cold blood and without provocation by shooting two bullets into the back of her head, just above the neck. (People's Exhibit No. 19, following R. C 205) In addition, the presentence investigation, which showed that petitioner's age was forty-six, included an extensive history of petitioner's record of prior delinquency and criminality. The prior conviction record is contained at footnote 17, page 16 of petitioner's brief.

Nothing in mitigation was shown in the instant record. Based on those facts, the trial court properly exercised its discretion in choosing a sentence of forty years. Since the record contains ample evidence in support of the trial court's judgment, there is no basis for petitioner's contention that the trial court based its sentencing determination on inaccurate and stale information contained in the psychological evaluations.

As the above summary of facts indicates, the trial court was aware of the potential hazards in relying upon the information in the psychological evaluations. In fact, the trial court characterized that evidence as "stale" and "hearsay". Indeed, the trial court heard extensive testimony by petitioner throughout which he disputed virtually every statement contained in the three psychological evaluations. Additionally, petitioner indicated that he had spent a limited amount of time with each examiner and questioned the credentials of at least one of the examiners. After that evidence had been taken, the trial court denied defense counsel's motion to strike the reports and

indicated that it had heard petitioner's evidence and was capable of determining what weight, if any, to give to the reports. In announcing the reasons for its sentencing determination, the trial court did not allude to the reports or any information contained therein.

Absent any indication that the trial court relied on the psychological evaluations or that such a reliance prejudiced petitioner, there is no reason to grant certiorari here and decide whether introduction of the evaluations deprived petitioner of any due process rights.

CONCLUSION

For the foregoing reasons, respondents pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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